In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-78-733

LEWIS W. POE,
Petitioner,

vs.

PERCY D. MITCHELL, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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November, 1978

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Lewis W. Poe, petitioner, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States District Court for the Southern District of Ohio, Western Division, rendered judgment without opinion. Without delivering an opinion, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

JURISDICTION

The judgment of the Court of Appeals in the form of an order (App. A, *infra*, p. A1) was entered on July

7, 1978. A timely petition for rehearing was denied without opinion on August 29, 1978 (App. B, *infra*, p. A3).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a military physician, acting at a routine medical level and *outside* the scope of his authority, is entitled to absolute immunity from civil liability by virtue of his being a serviceman.

2. Whether one serviceman may sue another serviceman for unlawful, unconstitutional, and intentionally reckless conduct, including medical fraud, which occurred while the defendant serviceman was acting under color of his office beyond the scope of his authority.

3. Whether the courts below deprived Mr. Poe of procedural due process of law when they prematurely dismissed his *pro se* action as the result of their erroneous acceptance of the unsupported *assumption* that the defendant serviceman was in fact acting in good faith and within the scope of his authority.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment provides, in part:

> Congress shall make no law * * *; * * * abridging the freedom of speech, * * *; or the right of the people * * * to petition the Government for a redress of grievances.

The Fourth Amendment provides, in part:

> The right of the people to be secure in their persons, * * *, against unreasonable * * * seizures, shall not be violated, * * *.

The Fifth Amendment provides, in part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Paragraph 4-35 of Air Force Manual 168-4, "Administration of Medical Activities," dated 15 March 1973, provides:

> *"Disposition of Person Who Refuses Professional Care.*
>
> A medical board will examine any military member who refuses to submit to medical or dental treatment, surgical operation, or diagnostic procedure. If the person bases his refusal on religious grounds, the hospital commander will arrange for the appointment of a chaplain as an additional member of the board. The board must decide whether:
>
> a. The patient needs the treatment in order to properly perform his military duties, and
>
> b. The treatment can normally be expected to produce the desired results. When the decision on both points is affirmative, the person will be so advised. If he still refuses, he may be tried by courts-

martial. Whether or not disciplinary action is taken, the unit commander may initiate appropriate action, such as discharge, retirement, etc. However, before doing so, he will refer the case to HQ USAF/SGP, Wash DC 20314, for consideration and review.

NOTE: When emergency treatment, surgery, or diagnostic procedure is required to preserve the health or life of the patient, it may be performed with or without his permission. The same is true when a diagnostic procedure or treatment is necessary to protect the health or life of a patient who has been declared by a qualified psychiatrist to be mentally incompetent."

STATEMENT OF THE CASE

On August 5, 1976, former Air Force Captain Lewis William Poe filed a *pro se* complaint for damages against former Air Force Major Percy D. Mitchell, Jr. in the U. S. District Court for the Southern District of Ohio, Western Division. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1332.

Poe alleged that his injury was sustained in the course of an unlawful and involuntary medical examination of him by defendant Dr. Mitchell, wherein the defendant caused the forcible injections of drugs—and himself injected a drug—into the person of Poe *without* Poe's consent, against Poe's will, and over Poe's protests. After said unlawful examination, medical mistreatment, trespass, and the invasion of Poe's privacy, the defendant allegedly dictated, signed, and published on June 27, 1974 a knowingly false, defamatory, and fraudulent psychiatric report

which immediately served as the *documentary* basis for an Air Force determination that Poe was "70% *mentally* disabled" when, in fact, there was no mental disability at all. Subsequently, Poe was relieved from active duty in 1974 because of Dr. Mitchell's *documented* "diagnosis of schizophrenia."[1] Net result: an honorable discharge *with stigma* for Capt Poe for the remainder of his life.

This particular case involved the "tail-end" of a conspiracy of Air Force officers to discredit Capt Poe and to unlawfully separate him from the Air Force so as to cover up wrongdoings and the dereliction in the performance of military duties by military commanders and medical officers.[2]

In the summer of 1974, Poe was unlawfully arrested at Dover AFB, Delaware, then transported across several State boundaries under duress, and thereafter involuntarily confined in a psychiatric ward at Wright-Patterson AFB, Ohio, in gross violation of the First, Fourth, Fifth, and Ninth Amendments and in violation of Air Force regulations.

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1. Exhibit A, dated 17 Dec 1976, which was appended to the Brief of the Appellant in the Court of Appeals for the Sixth Circuit, indicated:

> "Capt Poe presented to the Board as an articulate, rational, and coherent individual. His candid testimony, cooperation, and demeanor was exemplary. We recognize that the PEB [Physical Evaluation Board] does not usually address itself to the validity of the initial diagnosis. However, after careful consideration and evaluation of all documents and the testimony in this case, the Board finds that the preponderance of evidence is against the diagnosis of schizophrenia. At the very least, the evidence cast considerable doubt on this diagnosis." /s/ Joseph A. Gelet, Colonel, USAF, President, Formal USAF Physical Evaluation Board.

2. In the interest of brevity and for background information, this Court is referred to Docket No. 78-589, *Poe* v. *United States of America*, Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Ninth Circuit, filed October 10, 1978, in this Court by Mr. Brook Hart of Honolulu, Hawaii.

On June 11, 1974, Airman Paul E. Klinker of Dover AFB wrote in his letter[3] to U. S. Senator Birch Bayh of Indiana:

"* * * *.

> On June 5th, 1974, Captain Poe was taken under custody. The Commander of the Security Police Squadron and three other security policemen made an arrest and escorted Captain Poe across the street to the parking lot. They jacked him up and searched him * * *.
>
> I have been working with Captain Poe for approximately 6 months. I have great respect for this man. He always stands up for what is right and just. I think he is perfectly sane. Yet he is in an institution at Wright-Patterson AFB, Ohio and has been for one week now. Please help me to help him, so that I may still have faith in our fine country and justice."

After Poe's confinement in a psycho ward, the conspiracy to discredit him was virtually complete for now no one would believe him since he was essentially considered a "psycho." But the conspiracy did not end here. Poe alleged that on June 20, 1974—3 weeks after his confinement—defendant Mitchell told Poe that Poe did not have a psychiatric disorder nor a paranoid personality disorder. A week later, defendant Mitchell falsely and fraudulently published an official medical report, dated June 27, 1974, wherein he wrote, in part:

> "DIAGNOSIS [of Capt Poe]: Schizophrenia, paranoid type, chronic, severe; manifested by severe affective disorder, pressured speech, paranoid delusional system, * * *. Impairment, marked for further military duty; severe for vocational and social adaptation."

3. Airman Klinker's letter is Exhibit A which was appended to Poe's Petition for Rehearing in the Court of Appeals for the Sixth Circuit.

In his complaint, Poe alleged that (a) while it was within his power, Poe refused to be examined by USAF medical personnel and did not consent to any psychiatric treatment; (b) the defendant took it upon himself *to force drug treatment* upon Poe for no justifiable medical reason. This forced treatment upon Poe was *not* for Poe's direct benefit because there was nothing medically nor emotionally wrong with Poe; (c) there was no doctor-patient relationship between the defendant and the plaintiff; (d) the defendant was an Air Force psychiatrist who acted under color of federal law *in excess of* his lawful authority such that he departed from his official duty whereby his acts became his own personal acts; (e) on June 6, 1974, Poe received the initial *forced injection* against his will, without his consent, and over his verbal protest.

Poe's complaint included two affidavits, namely, the Affidavit of Lt. Sharon J. Sees, dated 10 May 76, and the Affidavit of SSgt Richard E. Deal, dated 4 June 76. These affidavits indicated that Capt Poe was not mentally ill during his psychiatric confinement at Wright-Patterson AFB, Ohio.

In paragraphs 38, 40, and 41 of his complaint, Poe alleged as follows:

> "38. On August 18 and 17, 1974, Poe underwent a psychiatric evaluation (unbeknown to the Air Force hospital staff) by a civilian psychiatrist, who has subsequently documented in a report which was sent directly to an attorney: 'Diagnostic Impression: Compulsive Personality.' "

"40. On September 4, 1974, Poe was officially separated from the Air Force for a non-existent disability."

"41. On September 8, 1974, at Poe's own request, Poe was admitted to a psychiatric facility under the supervision of a civilian psychiatrist to further evaluate Poe and to conduct a '600-mg Thorazine' experiment because of the false and fraudulent documentation by defendant Mitchell. This report was sent directly to an attorney, and it stated:

> 'When he [Poe] took the 100 and 200 mg TID, he was drowsy and his gait was a little wobbly and he fell asleep often during the day. * * *. The last two days of medication, his speech became slurred; he was having serious difficulties concentrating, staggered when he walked, * * *.
>
> * * * there are no sighs [sic] of paranoid thinking or signs of psychosis evident. His associations were not loose, there were never signs of tangential thinking. * * *.
>
> Mr. Poe will be discharged on September 20, 1974, and he can go back to work right away.' "

On August 5, 1976, Poe filed his complaint against defendant Mitchell.

On October 15, 1976, the defendant *untimely* filed in the District Court his Motion to Dismiss the plaintiff's action on the following grounds:

(1) lack of subject matter jurisdiction, and

(2) failure to state a claim upon which relief can be granted.

In his Affidavit, dated 3 November 1976, which was attached to his Nov. 9, 1976 Opposition to the defendant's Motion to Dismiss, Mr. Poe declared *under oath*:

> "* * *; that I was falsely arrested on May 29, 1974, and thereafter, on May 31, 1974, unlawfully, unconstitutionally, totally, and involuntarily confined * * *;
>
> * * * *.
>
> That Major Percy D. Mitchell, Jr., a USAF physician, *wrote*, in part, in his June 9, 1974 entry on Standard Form 509, Doctor's Progress Notes: 'Pt [Poe] now under my care. He has been given 400 mg Thorazine/day requiring only two shots of 50 mg IM for refusal to take P.O. meds.' /s/ P. Mitchell.
>
> * * * *.
>
> That the so called 'care and treatment' which were provided at Wright-Patterson USAF Medical Center were *forced* upon me without my consent, against my will, over my verbal protest, contrary to law and sound medical principles, and in violation of my constitutional right of privacy and bodily integrity. * * *."

After briefing by the parties and without oral argument, the District Court filed its order on December 15, 1976, granting the defendant's Motion to Dismiss.

On January 14, 1977, Poe filed his Notice of Appeal.

On July 7, 1978, without a hearing, the Sixth Circuit affirmed the judgment below, stating in its Order (App.A, *infra*, p. A2):

> "We conclude that a person on active military duty who is acting within the scope of his assigned duties

may not be required to answer in damages to another member of the armed forces who claims injuries resulting from those acts, whether negligent or otherwise."

In the "Conclusion" portion of his Petition for Rehearing, Poe wrote:

"Defendant Mitchell has acted outside the scope of his authority. The defendant has not in the slightest carried the burden of showing that he is entitled to the defense of absolute immunity. It appears inconsistent that the district court and the Sixth Circuit should presume that the defendant was acting within the scope of his medical duties in light of the serious allegations in the Complaint; * * *."

On August 29, 1978, the Sixth Circuit filed its Order, denying Poe's petition for rehearing.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue in this case because:

1. The existence of conflicting decisions in several judicial Circuits leaves a critical federal question unanswered in our ever-changing society. How should the federal courts *apply* the so-called "serviceman's immunity" doctrine, assuming it to be currently viable, *to situations* in which the defendant serviceman is *not* acting in line of duty or within the scope of his legal authority? Is such a defendant serviceman *automatically* entitled to absolute immunity? Does such a defendant serviceman, prior to his possible immunization by the Court, have the burden of showing that his conduct was within the scope of his

lawful duty and that his conduct was the type of action which entitled him to the defense of immunity?[4]

Although there is authority that a serviceman may not sue a military doctor for *negligent* acts which occurred while the military doctor was *performing in the line of duty*, *Bailey* v. *Van Buskirk*, 345 F.2d 298 (9 Cir. 1965), *cert. den.*, 383 U.S. 948 (1966); *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3 Cir. 1967), *cert. den.*, 389 U.S. 923 (1967); *Tirrill* v. *McNamara*, 451 F.2d 579 (9 Cir. 1971); *Martinez* v. *Schrock*, 537 F.2d 765 (3 Cir. 1976), we should carefully distinguish *between* military medical (mal)practice performed in good faith in line of duty with the consent of the military patient *and* military medical practice performed in bad faith, outside the line of duty, and in the clear absence of the consent of the military patient. The Third Circuit conceded[5] that the *Bailey* rationale has not captured universal acceptance, referring to the case of *Henderson* v. *Bluemink*, 167 U.S. App. D.C. 161, 511 F.2d 399 (D.C. Cir. 1974). Indeed the District of Columbia Circuit refused to immunize Army Major/Doctor Bluemink because it recognized a crucial distinction between governmental discretion and medical discretion, declaring that the "policy [of official immunity] is *not* applicable to the exercise of normal *medical* discretion." *Henderson*, *supra*, 511 F.2d at 403.[6] We should also note that a Veterans Administration doctor-administrator and a psychia-

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4. Please note that "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Butz* v. *Economou*, ... U.S. ....., 98 S.Ct. 2894, 2911 (1978).

5. *Martinez* v. *Schrock*, 537 F.2d 765, 767, fn. 1 (3 Cir. 1976).

6. Reinforcing is the fact that "[t]he executive privilege does not apply, however, where the conduct [of the defendant] is outside the employee's scope of authority." *Estate of Burks* v. *Ross*, 438 F.2d 230, 235 (6 Cir. 1971).

trist were granted absolute immunity in 1971 by the Sixth Circuit[7] while at the same time denying immunity to hospital assistants and nurses.

"In *Estate of Burks*, the court applied a 'discretionary-ministerial' analysis, but failed to draw the distinction between medical and governmental discretion which we deem essential to a proper application of that analysis." [footnote omitted] *Henderson, supra*, at page 403.

The decision in *Bailey*—a pre-*Scheuer*[8] decision—came at a time when federal officials with discretionary duties enjoyed absolute immunity from damage suits if they were acting within the scope of their authority or in line of duty. In general, the *Scheuer* Court had transformed the doctrine of absolute immunity into one of qualified/limited/conditional immunity which was dependent upon "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."[9]

In the words of *dissenting* Chief Judge Seitz in *Martinez* v. *Schrock, supra*, at p. 774 (3 Cir. 1976):

> "Although defendants' [two Army surgeons'] acts were discretionary in nature, it is clear that they were imbued, * * *, with *medical* and not *governmental* discretion. I therefore believe that defendants' acts were not governmental in nature and that defendants are not shielded from any liability which may arise out of the performance of those acts under the doctrine of qualified immunity."

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7. *Estate of Burks* v. *Ross*, 438 F.2d 230 (6 Cir. 1971).
8. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).
9. Ibidem.

Furthermore, "specific unlawful conduct by military personnel" may subject them to accountability "by way of damages or injunctive relief" in a court of law. *Scheuer* v. *Rhodes*, 416 U.S. 232, 249 (1974), quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 11-12 (1973).

An important federal issue has not been, but should be, finally settled by this Honorable Court. Over the years, the judiciary has created, extended, and modified the doctrine of immunity. Today this Court has an opportunity to definitively settle the question of under what conditions will a serviceman be immune, or not immune, from a damage suit brought by a plaintiff serviceman.

The adjudication of this important issue will hone the immunity doctrine with respect to all military personnel, will make it possible for the inferior courts to uniformly administer the "final law" relative to the so-called "serviceman's immunity" doctrine, and will eventually benefit all Americans, especially the honorable servicemen and women who may presently tremble and shudder under the ire of their commander for *legitimately* standing up for their military and civil rights or for legitimately "blowing the military whistle" on their commander.

2. The third question presented for review concerns the clear and gross denial of procedural due process of law and is of sufficient constitutional and administrative importance to warrant a review (a) because of the *manner* in which this case was decided below and (b) because the decisions of both the District Court and the Sixth Circuit are in direct conflict with the Supreme Court's "due process" holding in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

Poe alleged in his complaint that "Defendant Mitchell acted under color of federal law *in excess of* his lawful

authority, or, if within the scope of his official medical duties or medical position, he acted in an arbitrary, intentionally reckless, wanton, collusive, knowingly fraudulent, and/or unconstitutional manner such that he effectively departed from his official duty whereby his acts became his own personal acts." Poe further alleged the defendant knowingly, fraudulently, and in disregard of the foreseeable consequences of his acts, dictated, signed, and published in bad faith a *false* and defamatory medical document which "indicated" that Poe was mentally ill.

The District Court and the Sixth Circuit not only disregarded the presumed truth of Poe's allegations, thereby construing his complaint in light most favorable *to the defendant,* but somehow erroneously *assumed* that defendant Mitchell was in fact acting within the scope of his duty or authority.[10] Thus, on the basis of this *assumption,* the courts below automatically and prematurely immunized the defendant and consequently dismissed the action in the absence of any oral argument, without any evidentiary hearing to determine a crucial question of fact, and before any answer was filed by the defendant.

The District Court erroneously assumed that the defendant was "clearly acting within the parameters of his line of duty" while the Court of Appeals erroneously assumed the same when it concluded that an active duty serviceman *who is acting within the scope of his assigned duties* may not be required to answer in damages to another serviceman. Under these circumstances, the conclusions

10. In his dismissal motion, the defendant simply *asserted* that his acts were "in the performance of his official military duties" and attached an affidavit which essentially indicated that the defendant had treated Poe while the defendant was a Major on active duty in the Air Force, performing duty as a physician assigned to the USAF Medical Center, Wright-Patterson AFB, Ohio.

of the inferior courts were erroneous and in direct conflict with the judgment of the Supreme Court in *Scheuer, supra,* wherein this Court held that the District Court had acted prematurely in dismissing the complaints and that, in light of the allegations of their respective complaints, the plaintiffs were entitled to have them judicially resolved; and wherein Mr. Chief Justice Burger wrote, in pertinent part:

> "Fairly read the complaints allege that each of the named defendants, * * *, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.
>
> * * * *.
>
> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence * * *. The issue is * * * whether the claimant is entitled to offer evidence to support the claims. * * *.
>
> * * * *.
>
> * * *. The District Court acted before answers were filed * * *. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, * * *. There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the Courts from which such a finding of good faith could be properly made * * *.
>
> * * *. Similarly, the complaints place directly in issue whether the lesser officers and enlisted personnel of the [National] Guard acted in good-faith obedience to orders of their superiors. Further proceed-

ings, * * *, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint.

* * * *.

The judgments of the Court of Appeals are reversed * * *."

3. Simple justice requires it. Mr. Poe was not only *physically* deprived of the specific and penumbral guarantees under the Bill of Rights but was deviously separated from the United States Air Force with the stigma of being mentally ill when there was no basis in fact for that (fraudulently documented) diagnosis. Mr. Poe will, for the remainder of his life, carry the *false and tenacious* psychodiagnostic *label* of being, or having been, a "severe, chronic, paranoid schizophrenic." Mr. Poe has suffered enough.

CONCLUSION

The petitioner has only this Court of Justice to turn to for the resolution of this litigation . . . . and for ultimate justice.

Mr. Poe is *not* asking for special consideration or special treatment for himself simply because this whole matter *transcends* what happened to him as an individual. In effect, this case is representative of what can occur—and what in fact did occur—when government officials, acting under color of their office with the implied sanction of the sovereign, abuse and misuse the powers entrusted to them by virtue of their official position.

For the above reasons, petitioner humbly urges this Court to grant this petition for a writ of certiorari.

Respectfully submitted,

LEWIS W. POE
Petitioner Pro Se

November, 1978.

APPENDIX

APPENDIX A

No. 77-3110

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LEWIS W. POE,
Plaintiff-Appellant,

v.

PERCY D. MITCHELL, JR.,
Defendant-Appellee.

ORDER

(Filed July 7, 1978)

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

This appeal from dismissal of the plaintiff's complaint by the district court has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. The jurisdiction of the district court was based on diversity of citizenship. The district court held that the defendant was immune from suit since both the plaintiff and the defendant were on active military duty at the time of the acts which are the basis of the complaint.

In *Feres* v. *United States,* 340 U.S. 135, 141 (1950), the Supreme Court stated, "We know of no American law which ever has permitted a solider to recover for

negligence, against either his superior officers or the Government he is serving." (citation omitted). We conclude that a person on active military duty who is acting within the scope of his assigned duties may not be required to answer in damages to another member of the armed forces who claims injuries resulting from those acts, whether negligent or otherwise.

The judgment of the district court is affirmed. Rule 9(b)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

No. 77-3110

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

LEWIS W. POE,
Plaintiff-Appellant,

v.

PERCY D. MITCHELL, JR.,
Defendant-Appellee.

ORDER

(Filed August 29, 1978)

BEFORE: PHILLIPS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellant, the court concludes that the questions presented therein were fully considered and decided upon the original submission of this appeal.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

No. 78-733

In the Supreme Court of the United States

OCTOBER TERM, 1978

LEWIS W. POE, PETITIONER

v.

PERCY D. MITCHELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-733

LEWIS W. POE, PETITIONER

v.

PERCY D. MITCHELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brought this action in the United States District Court for the Southern District of Ohio seeking damages under 28 U.S.C. 1332 from respondent, an Air Force physician, for intentional mistreatment, invasion of privacy, and fraud in connection with his detention and psychiatric treatment on an Air Force base. The district court dismissed the complaint, holding (App. A, *infra*) that because petitioner was a member of the military, he could not recover dam-

ages for injuries sustained incident to his military service. The court found the rule of *Feres* v. *United States*, 340 U.S. 135 (1950)—barring suits calling into question the decisions of military officers because of the debilitating effect they would have on discipline and readiness—is applicable to damage actions brought against individual servicemen, as well as to claims against the government under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* The court of appeals affirmed, quoting *Feres*, *supra*, 340 U.S. at 141 (Pet. App. A1-A2):

> We know of no American law which has ever permitted a soldier to recover for negligence, either against his superior officers or the Government he is serving.

Petitioner also brought a parallel action in the District of Hawaii against the United States under the Federal Tort Claims Act. The district court dismissed the case on the authority of *Feres*, the court of appeals affirmed, and this Court denied certiorari. *Poe* v. *United States*, No. 78-589 (Dec. 11, 1978).

Petitioner contends (Pet. 10-13) that review is warranted in the instant case because of a conflict among the circuits on the question whether the *Feres* doctrine bars malpractice suits brought by servicemen under state law against military physicians. Compare *Henderson* v. *Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), with *Martinez* v. *Shrock*, 537 F. 2d 765 (3d Cir. 1976), cert. denied, 430 U.S. 920 (1977), and *Bailey* v. *DeQuevedo*, 375 F.2d 72 (3d Cir. 1967). Although the decisions petitioner cites

are not in accord, the disputed issue was squarely presented by the petition in *Martinez* v. *Shrock*, *supra*, and this Court declined to review the case. See 430 U.S. 920-922 (White, J., dissenting from the denial of certiorari). There is no reason for a different disposition in the instant case. To the contrary, the issue is one of decreasing prospective importance because of the enactment of a statute, 10 U.S.C. 1089(a), providing that for causes of action accruing after October 8, 1976, an action against the United States is the sole remedy for injuries resulting from the negligent or wrongful acts of medical personnel in the Armed Forces.

Petitioner also urges (Pet. 10-16) that the courts below erred in concluding that the *Feres* doctrine is applicable in view of the allegations in his complaint that respondent was acting in bad faith and outside of the scope of his official duties. This contention is without merit. At the time of his hospitalization, petitioner was on active duty in the Air Force. Respondent is an Air Force physician who treated petitioner in an Air Force hospital. Like the medical malpractice claims in *Feres* itself (340 U.S. at 136-137), petitioner's claims against respondent clearly "ar[ose] out of or [were] in the course of activity incident to service." 340 U.S. at 146. Petitioner's recent petition in his Tort Claims Act case, No. 78-589, also presented his contention that *Feres* is inapplicable in view of his allegations of intentional misconduct and bad faith. This Court declined to review that contention in the latter case, and it should do the same here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed December 15, 1976]

Civil No. C-3-76-241

LEWIS W. POE, PLAINTIFF

v.

PERCY D. MITCHELL

ORDER

This matter is before the Court upon the motion of the defendant to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. This is a diversity action brought under 28 U.S.C. § 1332 wherein plaintiff, formerly a captain in the United States Air Force, seeks to collect damages for the alleged intentional mistreatment, invasion of privacy, and fraud committed by the defendant, an Air Force psychiatrist.

The facts as gleaned from plaintiff's lengthy complaint are as follows. Late in 1973 plaintiff lodged several complaints against hospital personnel at Dover Air Force Base where he was stationed. On May 27, 1974 plaintiff was arrested by military police and was eventually transported to a psychiatric ward at Wright-Patterson Air Force Base in Dayton,

Ohio. When plaintiff refused any medication, he was forcibly restrained and given injections of Thorazine per the orders of defendant Major Mitchell. In a medical report dated June 27, 1974 Major Mitchell diagnosed plaintiff's condition as schizophrenia, paranoid type.

Had plaintiff been a civilian at the time of his allegedly unlawful treatment, his complaint may well state a valid claim. *Compare, Henderson* v. *Bluemink*, 511 F. 2d 399 (D.C. Cir. 1974) *with Estate of Burks* v. *Ross*, 438 F. 2d 230 (6th Cir. 1971). However, it is now a well-established rule of law that

> . . . members of the United States military service are immune from recovery, in suits brought by fellow members of the military service, for service-connected injuries caused by their negligent acts, either ministerial or discretionary in nature, performed in the line of duty.

Roach v. *Shields*, 371 F. Supp. 1392, 1393 (E.D. Pa. 1974); *see also Feres* v. *U.S.*, 340 U.S. 135 (1950); *Hass* v. *U.S.*, 518 F. 2d 1138, 1143 (4th Cir. 1975); *Tirrill* v. *McNamara*, 451 F. 2d 579 (9th Cir. 1971); *Bailey* v. *De Quevedo*, 375 F. 2d 72 (3rd Cir. 1967); *Kennedy* v. *Maginnis*, 393 F. Supp. 310 (D. Mass. 1975).

The above-stated rule of law has been extended to allegations of intentional wrongdoing. As was stated in *Rotko* v. *Abrams*, 455 F. 2d 992 (2d Cir. 1972), *aff'g* 338 F. Supp. 46 (D. Conn. 1971):

> The plaintiff's attempt to limit the *Feres* doctrine to negligence actions is rejected. The reasoning of the Supreme Court clearly indicates that it is the status of the claimant as a serviceman rather than the legal theory of his claim which governs in such cases. (citations omitted). 338 F. Supp. at 47.

See also Levin v. *U.S.*, 403 F. Supp. 99 (D. Mass. 1975).

Plaintiff's complaint indicates that the defendant was acting as a military doctor in a military hospital. Regardless of the nature of the treatment he administered to the plaintiff, he was clearly acting within the parameters of his line of duty. *See Adams* v. *Banks*, 407 F. Supp. 139 (E.D. Va. 1976).

Accordingly, defendant's motion to dismiss is hereby GRANTED.

IT IS SO ORDERED.

CARL B. RUBIN
/s/ Carl B. Rubin
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 284428 266

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-733

LEWIS W. POE,
Petitioner,

vs.

PERCY D. MITCHELL, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

LEWIS W. POE
3853-C Keanu Street
Honolulu, Hawaii 96816
Petitioner Pro Se

January, 1979

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

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PETITIONER'S REPLY MEMORANDUM

For the record only, I object to the *untimely* filing, on January 8, 1979, of the Memorandum for the Respondent in Opposition (hereinafter referred to as the "Resp. Memo.").

No matter how the Respondent, wittingly or unwittingly, beclouds the issues, the principal legal questions concern the due process of law and the immunity of military physicians in the Executive Branch in light of the decisions in *Butz* v. *Economou*, ... U.S. ....., 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In effect, the Sixth Circuit ruled that Respondent Mitchell was *absolutely* immune *if* he acted within the scope of his lawful duties. (Pet. App. A, p. A2)

In response to the Respondent's reference to and inclusion of the district court's dismissal order (Resp. Memo. App. A, 1a-3a), I am appending my complaint without

Exhibits (App. A, *infra*) which was filed on August 5, 1976 in Civil Action No. C-3-76-241, U. S. District Court at Dayton, Ohio, to refute erroneous and/or misleading information which is contained in the district court's dismissal order. The complaint clearly indicates that the Respondent acted *outside* the scope of his official duties.

Apparently, the Respondent is asking this Court to *blindly* apply the *Feres* doctrine, notwithstanding, or in full disregard of, the type of suit and the nature of the allegations in my complaint. The difficulty with the Respondent's contention is that the holding in *Feres* did *not* create an absolute personal immunity for military physicians from lawsuits, involving *unconstitutional* conduct and *intentional* torts arising under *both* federal and state law.

The Respondent appears to be saying that it doesn't matter at all how a serviceman was injured as long as he was a member of the armed forces at the time of injury. It doesn't matter *how* and *why* I was unlawfully hospitalized. It doesn't matter if I was unlawfully arrested and unconstitutionally confined in an Air Force psychiatric ward. It doesn't matter if there was no doctor-patient relationship between the Respondent and Poe. It doesn't matter if my constitutional right of privacy was violated. It doesn't matter if my right to informed consent was disregarded. It doesn't matter if psychotropic medication was forcibly injected into my body against my will and without my consent. It doesn't matter if Respondent knowingly published a false and fraudulent medical report concerning Poe's mental status. All that matters is that Poe was on "active duty"[1] in the Air Force, was injured

1. Poe's active duty" status *after* his unlawful and unconstitutional arrest and psychiatric confinement is in dispute. Poe was a prisoner without rights nor military standing. Neither was Poe serving a military function or mission. Nor was he under lawful military orders.

in an Air Force hospital, was "treated" by an Air Force physician, and was "diagnosed" as "mentally ill" by said Air Force physician. Thus,—Respondent reasons—"petitioner's claims against respondent clearly 'ar[ose] out of or [were] in the course of activity incident to service.'" (Resp. Memo. 3) We have reached the acme of absurdity. The *Feres* doctrine should not be blindly misapplied or misused.

Furthermore, please note that the Respondent has not challenged the facts which are presented in the "Statement of the Case." (Pet. 4-10)

Apparently, the Respondent wishes to rewrite the *Feres* doctrine by interjecting the proposition that *Feres* v. *United States,* 340 U.S. 135 (1950), "barr[ed] suits calling into question the decisions of military officers because of the debilitating effect they would have on discipline and readiness." (Resp. Memo. 2)

Feres did no such thing.[2] The *Feres* Court concluded that the *Government* was not liable *under* the Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

When a military officer, such as the Respondent, not only commits medical fraud but violates his own regulation, such as paragraph 4-35 of Air Force Manual 168-4 (Pet. 3-4), he causes a greater "debilitating effect" on military discipline. Violation of regulations and fraud are not encouraged in the military—at least, not lawfully.

The Respondent's proposition that *Feres* barred suits calling into question the decisions of military officers says

2. "The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining 'incident to the service' what under other circumstances would be an actionable wrong." *Feres* v. *United States,* 340 U.S. 135, 138 (1950).

far too much for it is tantamount to a unique variant of the doctrine of sovereign immunity. Ultimately, this proposition says that military personnel in the Executive Branch can do no wrong; that they should not be personally accountable nor liable for their actions, no matter how malicious, fraudulent, or egregious. If this were so, then military officials in the Executive Branch would be shielded by the doctrine of absolute immunity in all military situations *whereas* other federal officials in the Executive Branch would not be generally afforded the defense of absolute immunity for their constitutional transgressions. See *Butz, supra.*

If the decisions of military officers should not be questioned, then why is it Air Force policy to fully promulgate and encourage its employees to use the Inspector General Complaint System to air their grievances?

In *Butz, supra,* 98 S.Ct. at 2900, the United States on behalf of the petitioners asserted a similar proposition—

> that all of the federal officials sued were absolutely immune even if they infringed a person's constitutional rights and even if the violation was knowing and deliberate.

Naturally, the Supreme Court rejected such a claim. We know that not even the head of the Executive Branch, our Commander-In-Chief, is above the law. "No man in this country is so high that he is above the law." *Butz, supra,* 98 S.Ct. at 2910.

In *Bivens* v. *Six Unknown Named Agents,* 456 F.2d 1339 (2 Cir. 1972), the Second Circuit held that the agents were not absolutely immune and that the public interest was sufficiently protected by according the agents and their superiors a qualified immunity.

The Second Circuit realized that it would be incongruous and confusing to develop different standards of immunity for state officers sued under 42 U.S.C. § 1983 and federal officers sued on similar grounds under causes of action founded directly on the Constitution. The advantage of having *one* federal immunity doctrine for suits arising under federal law is self-evident.

Today, the Respondent pleads for *automatic,* absolute immunity. I think he is sufficiently protected by the doctrine of qualified immunity, *assuming he is entitled to that much.* The Respondent is not presumed to be immune from suit and must establish his right to immunity. See *Morgan* v. *Willingham,* 424 F.2d 200, 202 (10 Cir. 1970).

Circuit Judge Merritt, dissenting in *Granger* v. *Marek,* 583 F.2d 781, 787 (6 Cir. 1978), stated:

> "In most instances where the officer is acting in the line of duty * * *, the qualified immunity will protect him. The qualified immunity will protect the victim, however, in those instances when the officer, acting dishonestly or out of malice, abuses his authority."

Respondent asserted (Resp. Memo. 1-2) that the district court held that Poe could not recover for injuries *sustained incident to Poe's military service.* Please note that the district court *never* expressly concluded nor found that my injuries were sustained incident to my military service. Moreover, the Respondent was on active duty in the capacity of an Air Force Major, enjoying all the privileges, courtesies, benefits, respect, authority, and responsibilities of his rank and office as a commissioned officer. On the other hand, I was not, *in actuality,* on "active duty" *after* my illegal arrest and confinement be-

cause I enjoyed none of the privileges of my "rank" and "office" during my psychiatric confinement. In reality, I had no military standing, and my military, constitutional, and due process rights were *utterly disregarded.*

The Respondent (Resp. Memo. 2) and the Sixth Circuit (Pet. App. A, pp. A1-A2), in quoting *Feres,* 340 U.S. at 141, omitted an extremely important citation, i.e., *Dinsman* v. *Wilkes,* 12 How. [53 U.S.] 390 (1851).

The *Feres* Court recognized a significant difference between honest mistake or negligence and *intentional torts* committed by military personnel. The *Feres* Court specifically called attention to the case of *Dinsman* v. *Wilkes, supra, as to intentional torts.* In *Dinsman,* a marine was permitted to bring an action against his commanding officer, Captain Wilkes. See *Dinsman, supra,* at 402-403. This marine was certainly not barred by any absolute immunity doctrine. In *Dinsman, supra,* at 404, Chief Justice Taney stated that *if* Captain Wilkes acted honestly and from a sense of duty, then he was not liable for a mere error in judgment. However, Captain Wilkes was liable *if* he acted from a disposition to oppress, from malice, or from vindictiveness, and inflicted excess punishment. The question of fact for the jury to determine was whether Captain Wilkes acted from improper motives and abused the power confided to him to the injury of the plaintiff.

Hence, medical mistreatment, medical fraud, and intentional and unconstitutional conduct by the Respondent along with bad faith bear heavily on this case. At best, the Respondent *may* be entitled to a qualified immunity, but certainly no more.

The Respondent *incorrectly* stated (Resp. Memo. 2) that Poe had brought "a parallel action" in the District of Hawaii under the Federal Tort Claims Act. Not so.

Respondent Mitchell is nowhere mentioned in Hawaii Civil Action No. 76-0392.[3]

Respondent *erroneously* asserted (Resp. Memo. 2) that Poe contends that review is warranted because of a conflict among the circuits "on the question whether the *Feres* doctrine bars malpractice suits brought by servicemen under state law against military physicians."

First, the questions presented (Pet. 2) are not predicated on the *Feres* doctrine. They are predicated on the doctrine of official immunity and the due process of law. Second, this action is not a medical malpractice suit. There can be no medical malpractice herein simply because "there was no doctor-patient relationship between the defendant and the plaintiff." (Pet. 7) Third, both *federal* and *state* law are involved. This is an action in tort for injury sustained by Poe in the course of an unlawful and involuntary medical examination of Poe by the Respondent, acting under color of federal law in excess of his legal authority, for violation of Poe's constitutional right of privacy and for medical fraud perpetrated by the Respondent.

Respondent *incorrectly* asserted (Resp. Memo. 3) that "the disputed issue was squarely presented by the petition in *Martinez* v. *Schrock.*" Nothing could be further from the facts. In *Martinez* v. *Schrock,* 537 F.2d 765 (3 Cir. 1976), cert. denied, 430 U.S. 920 (1977), it was an established fact that the two Army surgeons were acting *within* the scope of their official duties while performing an operation on a *consenting, retired* Army sergeant and civilian employee at Fort Dix. In the instant case, the Respondent acted *beyond* the scope of his legal authority.

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3. See Petition for Certiorari No. 78-589, *Poe* v. *United States,* which is still pending before this Court because Mr. Brook Hart of Honolulu filed a Petition for Rehearing on January 4, 1979.

See district court complaint (App. A, *infra*). Moreover the courts below erroneously *assumed* that Respondent was acting in good faith and within the scope of his lawful duties—without giving me an opportunity to challenge the facts *assumed* therein. Unlike *Martinez, supra,* this action is not founded on medical malpractice, and it involves *both* state and federal law. In short these two cases are distinguishable and so are the issues.

Justice White, dissenting from the denial of certiorari in No. 76-530, aptly stated:

> "nowhere has it been suggested that there is a judicially created unqualified immunity for Government functionaries operating at respondents' level. * * * the District of Columbia Circuit held that an Army medical officer was not entitled to absolute immunity from suit. *Henderson* v. *Bluemink,* 167 U.S. App. D.C. 161, 511 F.2d 399 (1974). Hence, there is a square conflict * * *." *Martinez* v. *Schrock,* 430 U.S. 920, 921-922 (1977).

The Respondent claimed (Resp. Memo. 3) that enactment of 10 U.S.C. § 1089(a) decreases the importance of the issue. It is not true in cases like the instant one because 10 U.S.C. § 1089(a) applies to medical malpractice; § 1089 does not apply here because Respondent acted outside his scope; and § 1089 is not retroactive.

Respondent *incorrectly* asserted (Resp. Memo. 3) that:

> "Petitioner also urges (Pet. 10-16) that the courts below erred in concluding that the *Feres* doctrine is applicable * * *."

Petitioner's urgings (Pet. 10-16) are a matter of record and concern the Reasons for Granting the Writ. I never once used the word "Feres" nor the phrase "Feres doctrine" in my *entire* Petition for Certiorari No. 78-733. That ought to indicate that the Questions Presented (Pet. 2) herein are concerned fundamentally with issues other than the *Feres* doctrine.[4]

Respondent asserted (Resp. Memo. 3) that Poe's claims against him clearly arose out of or were in the course of activity incident to Poe's service. Nonsense. In light of the *undisputed* Statement of the Case (Pet. 4-10), *if* these events[5] and constitutional transgressions by the Respondent are deemed "incident to Poe's military service," then the meaning of "incident to service" proves far too much and ultimately becomes meaningless. No one will be able to distinguish between what is and what is not "incident to one's service." Presto, if one is in active federal service, then all military activity can be labeled "incident to one's military service." Furthermore, "incident to one's military service" is a question of fact—to be determined by the offering of evidence in a fair tribunal.

The Respondent urges (Resp. Memo. 3) this Court to continue to deny certiorari because of a previous denial of certiorari on December 11, 1978 in *Poe* v. *United States,* No. 78-589. That fact is not dispositive in this case. Would the Respondent argue that had this Court granted certiorari in No. 78-589, it should then do the same here? Of course not.

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4. However, Pet. for Cert. No. 78-589 did concern the applicability of the *Feres* doctrine.

5. Since Poe's arrest and psychiatric confinement were illegal, all subsequent involuntary examinations, forcibly administered "treatment," and medical "documentation" by the Respondent are legally suspect at the very least.

CONCLUSION

I was illegally arrested and confined without medical cause therefor. My person was subjected to the devastating effects of drugs—unconstitutionally administered, forcibly injected. I cannot undo what has already been done to me, but I may be able to prevent it from happening to others in the future—with the help of this Court.

In light of the undisputed allegations in the complaint (App. A, *infra*), to be foreclosed from offering evidence in support of my claims by a grant of *absolute* personal immunity to a military physician *in the complete absence of* a showing that said military physician was in fact acting within the scope of his lawful duty appears to be inconsistent with the recent decision in *Butz* v. *Economou*, ... U.S. ....., 98 S.Ct. 2894 (1978) and our traditional concepts of official immunity.

Respectfully submitted,

LEWIS W. POE
Petitioner Pro Se

January, 1979

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Civil Action No. C-3-76-241

LEWIS W. POE,
Plaintiff,

vs.

PERCY D. MITCHELL, JR.,
as a private individual,
Defendant.

COMPLAINT

TO UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT, OHIO, WESTERN DIVISION, DAYTON:

Plaintiff [also herein referred to as "Capt Poe" or "Poe"] alleges as follows:

JURISDICTION

1. Jurisdiction is founded on diversity of citizenship and amount in controversy exceeds, exclusive of interest and costs, the sum or value of $10,000.00. Plaintiff is a resident and citizen of the State of Hawaii while the defendant is a resident of the State of Ohio or a State other than the State of Hawaii.

2. The acts upon which this complaint is founded were performed at or near Wright-Patterson USAF Medi-

cal Center, Ohio. Plaintiff has suffered within and outside the State of Ohio.

INTRODUCTION AND BACKGROUND INFORMATION

3. This is an action in tort for damages for personal and/or bodily injury sustained by plaintiff in the course of an unlawful and involuntary medical examination of the plaintiff by defendant PERCY D. MITCHELL, JR. Plaintiff seeks to recover compensatory and punitive damages for injury to his person and reputation and for losses incident thereto, including at least $1,547.60 for special medical expenses. Furthermore, this cause of action is brought for relief on the basis of actual or constructive fraud and for invasion of privacy and bodily integrity.

4. On May 29, 1974, Capt Lewis W. Poe, plaintiff herein, was employed by the United States Air Force as a Regular Captain on active duty at Dover AFB, Delaware. On that date, Poe was unlawfully arrested by several members of the Dover AFB Security Police. See Exhibit 34. *Under duress and coercion,* Poe was unlawfully transported across several State lines and was involuntarily and totally confined in Psychiatric Ward 4 West at Wright-Patterson USAF Medical Center, Ohio, on May 31, 1974.

5. From the time of Poe's arrest, the Air Force or its agents has/have forced Poe to submit to psychiatric examination under the *guise* of a legitimate "inpatient evaluation." The ulterior motive of this "examination" was to discredit Poe, to destroy his credibility, and to separate Poe from the Air Force because of Poes' grave allegations/charges against hospital personnel and command authority at Dover AFB, Delaware.

6. While it was within his power, Poe constantly refused to be examined by USAF medical personnel. At

all times material to this action, Poe has never consented to any treatment except for dental care of his tooth and x-rays of his injured neck in June of 1974 while confined at Wright-Patterson USAF Medical Center. Plaintiff was *never* a patient—only an involuntarily confined *resident* in a psycho ward. In early-to-mid June of 1974, USAF medical personnel, including defendant Mitchell, took it upon themselves *to force drug treatment* upon Poe for no justifiable *medical* reason. *This* forced treatment upon Poe was *not* for his direct benefit because there was nothing medically nor emotionally wrong with Poe, but was apparently employed as an effective or expedient "behavior modifying" device, used at the call and whim of said USAF medical personnel to assert their authority over the plaintiff. Moreover, no doctor-patient relationship actually existed between defendant Mitchell (nor any other Air Force psychiatrist) and the plaintiff.

7. The personal injury of the plaintiff was incident to the unlawful and involuntary *examination* of Poe *and* the false and fraudulent psychiatric report (Exhibit 36) which was dictated, authorized, signed, and/or published by defendant Mitchell on or about June 27, 1974.

8. On September 4, 1974, Poe was relieved from active military duty (see Exhibit 38) and retired for a *non-existent* disability—in effect, an insidious cover-up of an extensive and sordid mess which had its beginnings at Dover AFB, Delaware, and which transcends this particular cause of action.

SUMMARY OF FACTS

9. At all times material to this action, defendant Doctor/Major PERCY D. MITCHELL, JR., was a USAF psychiatrist at Wright-Patterson USAF Medical Center in the employ of the Air Force. Defendant Mitchell acted under color of federal law *in excess of* his lawful authority,

or, if within the scope of his official medical duties or medical position, he acted in an arbitrary, intentionally reckless, wanton, collusive, knowingly fraudulent, and/or unconstitutional manner such that he effectively departed from his official duty whereby his acts became his own personal acts.

10. On December 6, 1973, a week *after Capt Poe* had filed his second Inspector General complaint *against* hospital personnel and command authority at Dover AFB, the Dover AFB Hospital Commander wrote in a document, dated 6 Dec 73 (whose contents were made known to the Wing Inspector General):

> "If there is a question regarding the quality of Captain Poe's performance and constructive use of time, consideration may be made in the matter of discharge through administrative channels IWA [sic] AFM 36-2/36-3."

11. On December 11, 1973, that same Hospital Commander maliciously wrote in paragraph 3 of his 11 December 1973 letter to Colonel Kuyk (the Wing Commander), Subject: Lewis Poe, Captain, USAF, 576-28-7043:

> "I feel that there is definitely a question regarding the quality of Captain Poe's performance and constructive use of time and consideration may be made in the matter of discharge through administrative channels IAW AFM 36-2/36-3. It would appear to me that the time and mental investment he has put into his letters and complaints over the past several months must have adversely affected his performance of duty and would constitute criteria to discharge him administratively. . ."

12. In February 1974, three months *prior* to Poe's unlawful arrest, seven people wrote letters of recommendation (Exhibits 20, 21, 22, 22.1, 22.2, 22.3, and 22.4) to the University of Hawaii School of Law on behalf of Capt Poe, bearing witness to his good character, reputation, and mental soundness.

13. On April 5, 1974, an Air Force psychiatrist at Dover AFB said to plaintiff:

> "I believe they're trying to discharge you."

14. On April 16, 1974, the Base Commander at Dover AFB said to plaintiff:

> "The deck is stacked against you. They've given in all they're going to, especially the hospital. You can't win."

15. On May 28, 1974, Poe was unlawfully ordered to report to the Dover AFB Hospital. On that same day, the Hospital Commander wrote on Standard Form 502, Narrative Summary, dated 28 May 74:

> "(Dr. Mitchell, Wright-Patterson USAF Hospital, has agreed to accept the patient for inpatient evaluation.)"

16. On May 29, 1974, Poe was unlawfully arrested at Dover AFB by several AF Security Policemen. See Exhibit 34.

17. On May 31, 1974, Poe was unlawfully, involuntarily, and totally confined in Psychiatric Ward 4 West, Wright-Patterson USAF Medical Center, Ohio.

18. On June 4, 1974, Poe refused to take a 10-mg pill of Librium which was prescribed by Major/Dr. Jerome Young for no justifiable medical reason.

19. On June 6, 1974, Poe, after refusing for two days to take said pill, asked Dr Young, a USAF psychiatrist, why said pill was prescribed. Dr Young responded by tell-

ing a nurse, "Increase that to 50 mg of Thorazine." Poe calmly stated that he refuses to take that too whereupon Dr Mitchell spontaneously intervened, saying "If he refuses, inject it." Thus, on June 6, 1974, plaintiff received the initial, *forced injection* against his will, without his consent, and over his verbal protest in clear contravention of sound medical principles. The effect of said injection was overwhelming. Poe believes he passed out sitting on a chair and was taken or escorted to his assigned bed.

20. On June 7, 1974, three hospital personnel attempted to give Poe a second injection for his refusal to take a pill. A struggle ensued, and Poe's neck was injured in this struggle. [Poe continues to suffer intermittently from this neck injury.] Poe received a forced injection into his left upper arm. Poe was again in a "Chemical Strait-jacket" and terrifyingly realized that he was in a "survival situation."

21. On or about June 13, 1974, defendant Mitchell increased the daily dosage of Thorazine from 400 mg to 600 mg. Poe observed increased skin pigmentation on his forehead above both eyes. [After two years, residual pigmentation traces on plaintiff's forehead still exist.]

22. On or about mid-June 1974, defendant Mitchell told Poe that he has been receiving a lot of phone calls from high ranking people on Poe's case. Defendant Mitchell told Poe that these people would begin, "Dr Mitchell, I don't mean to put any pressure on you but," to which Poe responded, "I hope they can't pressure you." Defendant Mitchell replied with assurance, "They can't."

23. On June 17, 1974, defendant Mitchell discontinued the "noon medication." On June 18, 1974, defendant Mitchell discontinued all medication. Poe complained of twitching under his heart to Nurse/Captain Nina Baer.

24. On June 20, 1974, defendant Mitchell told Poe that Poe was an "s-1" (meaning no psychiatric disorder) and that Poe did not have a paranoid personality disorder. *This* diagnosis was correct.

25. On or about June 21, 1974, defendant Mitchell signed, or authorized the signing of, AF Form 569 (Exhibit 35), authorizing Poe's initial release and a 3-day-pass from the hospital.

26. On or about June 26, 1974, defendant Mitchell prescribed a daily dosage of 200 mg of Thorazine for no medically justifiable reason. Defendant Mitchell, against Poe's will and over his verbal protest, injected 50 mg of Thorazine into Poe's buttocks for Poe's refusal to take the prescribed medication. Not only was the forced treatment unlawful, but defendant Mitchell maliciously, wilfully, recklessly, or negligently failed to exercise due care and diligence and failed to render proper care to meet the *actual* needs (if any) of the plaintiff, that is, defendant Mitchell forced and rendered improper and unreasonable care upon the plaintiff in spite of the fact that there was no doctor-patient relationship between defendant Mitchell and Capt Poe.

27. On June 27, 1974, defendant Mitchell dictated a detailed narrative summary (Exhibit 36) into plaintiff's medical records.

28. Said dictated narrative summary was false, defamatory, and fraudulent. For example, on the third page of Exhibit 36, defendant Mitchell dictated/wrote, knowing it to be false:

> ". . . the patient was placed on Thorazine reaching 600 mg. per day. At that level he became a much warmer affectively and . . . individual. He looked so very well on the medication . . ."

29. For example, on the third page of Exhibit 36, defendant Mitchell dictated/wrote, again knowing it to be false:

> "As a test the patient was then taken off of medication completely. Within a five day period thereafter he appeared slightly worse than his admission presentation, similar guardedness, suspiciousness, inability to cooperate with anyone other than the downtrodden usually minority patients who were most severely sick."

30. For example, on the fourth page of Exhibit 36, defendant Mitchell dictated/wrote, again knowing it to be false:

> "DIAGNOSIS: Schizophrenia, paranoid type, chronic, severe; . . . ." [See Exhibit 36 for the remainder of this passage.]

31. For example, on the fourth page of Exhibit 36, defendant Mitchell dictated/wrote, again knowing it to be false:

> ". . . this patient looks quite well on medication and . . . can appear close to normal when on no medications. He is nevertheless an extremely sick individual and needs the attention of a medical facility.
>
> /s/ Percy D. Mitchell Jr."

32. On June 27, 1974, *defendant Mitchell,* by his own personal acts or in collusion with or wrongful encouragement from others, such as Dr/Colonel Scibetta (head of the psychiatric services at Wright-Patterson USAF Medical Center), *maliciously, knowingly, wilfully, recklessly, fraudulently, and in disregard of the foreseeable consequences of his acts,* dictated, authorized, signed and/or published in bad faith a false and defamatory, four-page

medical document (Exhibit 36) which served as the basis of a USAF Medical Board's finding that Poe was "70 per cent mentally disabled," and hence unfit for military duty.

33. Said medical document operated prejudicially on plaintiff's right to a good name, reputation, honor *and personal safety,* and constituted an invasion of plaintiff's right to gainful employment, his civilian and military careers and the pursuit of happiness.

34. On or about June 28, 1974, defendant Mitchell signed, or authorized the signing of AF Form 569 (Exhibit 35A), authorizing Poe's second three-day pass from the hospital in spite of the fact that defendant Mitchell had just dictated, inter alia, on June 27, 1974, that Poe "is nevertheless an extremely sick individual and needs the attention of a medical facility."

35. Plaintiff was never a chronic, severe, paranoid schizophrenic. Plaintiff was never paranoid nor schizophrenic. See Exhibits 22.5 (affidavit of Lt Sharon J. Sees) and Exhibit 22.6 (affidavit of SSgt Richard E. Deal).

36. On or about July 29, 1974, plaintiff discovered the gross fraud and defamation of his character which were perpetrated by at least defendant Mitchell.

37. On July 30, 1974, a USAF psychiatrist at Wright-Patterson Medical Center said to Poe, "Your case has gotten bigger and bigger and bigger. It would take an Act of God to correct."

38. On August 10 and 17, 1974, Poe underwent a psychiatric evaluation (unbeknown to the Air Force hospital staff) by a civilian psychiatrist, who has subsequently documented in a report which was sent directly to an attorney:

> "Diagnostic Impression: Compulsive Personality."

39. On August 39, 1974, Poe was admitted to psychiatric Ward 54B of VA Hospital, Palo Alto, California and discharged therefrom on September 6, 1974. See Exhibit 39.

40. On September 4, 1974, Poe was officially separated from the Air Force for a non-existent disability.

41. On September 8, 1974, at Poe's own request, Poe was admitted to a psychiatric facility under the supervision of a civilian psychiatrist to further evaluate Poe and to conduct a "600-mg Thorazine" experiment because of the false and fraudulent documentation by defendant Mitchell. This report was sent directly to an attorney, and it stated:

> "When he [Poe] took the 100 and 200 mg TID, he was drowsy and his gait was a little wobbly and he fell asleep often during the day. . . . The last two days of medication, his speech became slurred; he was having serious difficulties concentrating, staggered when he walked, . . .
>
> . . . there are no sighs [sic] of paranoid thinking or signs of psychosis evident. His associations were not loose, there were never signs of tangential thinking. . . .
>
> Mr. Poe will be discharged on September 20, 1974, and he can go back to work right away."

42. *Thus, at the very minimum, defendant Mitchell,* acting under color of federal law *in excess of* his lawful authority [or, if within the scope of his official and professional medical duty, acting in an arbitrary, intentionally unprofessional, malicious, reckless, collusive, knowingly fraudulent and/or unconstitutional manner] *and in the absence* of a doctor-patient relationship, *wrongfully,* tortiously, maliciously, knowingly, fraudulently, in bad faith

and/or in reckless disregard of the foreseeable consequences of his alleged personal acts, *caused* personal and bodily injury to the plaintiff.

SOME INJURIES TO PLAINTIFF

43. As a result, plaintiff has suffered injury and damage to his honor, reputation, and integrity as a person and as a commissioned officer in the USAF; injury, interruption, damage to his professional military career, including loss of job, loss of present and future income, loss of his expected property interest in his Air Force retirement equity; destruction of professional and personal relationships; injury to his body; severe mental distress, humiliation, frustration, and anguish; invasion of privacy and the pervasive disruption of his life.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $1,547 in special damages, $2,000,000 in compensatory damages and $2,000,000 in punitive damages; for plaintiff's costs, attorneys' fees and services incurred herein; and for such equitable or other relief as may be just, necessary, and proper.

Respectfully submitted,

/s/ Lewis W. Poe
Lewis W. Poe Plaintiff Pro Se
3853-C Keanu St.
Honolulu, HI 96816
[phone: (808) 734-6327]

DATED: August 2, 1976
at Honolulu, Hawaii.

TRIAL BY JURY REQUESTED

Plaintiff requests a trial by jury in this action.